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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1938

Nos. 212-213

SOUTHERN PACIFIC COMPANY, *Appellant*,
vs.
JOHN C. CORBETT *et al.*, *Appellees*. — No. 212

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, *Appellant*,
vs.
JOHN C. CORBETT *et al.*, *Appellees*. — No. 213

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF ATTORNEY GENERAL OF WASHINGTON ET AL., AMICI CURIAE

And petition for leave to file.

G. W. HAMILTON,
Attorney General of the State of Washington,
R. G. SHARPE,
Assistant Attorney General of the State of Washington,
Amici Curiae.

Temple of Justice, Olympia, Wash.

STATE PRINTING PLANT, OLYMPIA, WASHINGTON

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Come now G. W. Hamilton, Attorney General of the State of Washington, and R. G. Sharpe, Assistant Attorney General of the State of Washington, and move the Court for an order permitting said G. W. Hamilton and R. G. Sharpe to file the annexed brief *amici curiae* in the above entitled appeals.

This motion is based upon the records and files in said appeals and upon the attached affidavit of R. G. Sharpe.

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,
Amici Curiae.

State of Washington, }
} ss.
County of Thurston, }

R. G. Sharpe, being first duly sworn, on oath, deposes and says: That G. W. Hamilton who signed the foregoing motion, is the duly elected, qualified and acting Attorney General of the State of Washington, and affiant is the duly appointed, qualified and acting Assistant Attorney General of the State of Washington; that ever since 1935 the statutes of Washington, to-wit: Title IV, chapter 180, Laws of Washington of 1935 and chapter 191, Laws of Washington of 1937, have imposed, and do now impose, an excise on the users in Washington of tangible personal property purchased at retail, and of the same general kind and nature as that imposed by the statutes of California, the validity of which, as applied to interstate railroads and telephone companies, is involved in the above appeals, and that the decision in said appeal will in large measure be determinative of the validity of the excise so imposed by the Washington statutes as applied to the activities of said companies, and that the State of Washington is therefore directly interested in the outcome of said appeals.

This affidavit is made in support of the attached motion for leave to file a brief *amici curiae*.

R. G. SHARPE.

Subscribed and sworn to before me this 3rd day of December, 1938.

[redacted]
Notary Public in and for the State of Washington,
residing at Olympia.

GEO. L. HARRIGAN
NOTARY PUBLIC IN AND FOR THE STATE OF
WASHINGTON, RESIDING AT OLYMPIA

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ARGUMENT

From the facts revealed by their respective records, it is apparent that the controlling principles of law are the same in each of these two appeals. For this reason it is thought proper to express our views in a single brief wherein we will, for brevity's sake, refer to the appellees (plaintiffs below) as the "utilities."

As applied to chattels used as part of the Utilities' interstate plants, California "use" tax is not void as a direct tax on interstate commerce.

It is, of course, well settled that a State cannot lay a tax upon interstate commerce in any form. 7 Encyc. of U. S. Sup. Crt. Repts., pp. 441-443. Examples of State excises held invalid under this rule are set forth in the footnote.*

But this rule must not be extended beyond necessity of keeping interstate commerce free from interference.

"Taxation by the states of the business of interstate commerce is forbidden only because it is deemed an interference with that commerce, the uniform regulation of which is necessarily reserved to the Congress. *Minnesota Rate Cases*, 230 U. S. 352, 400. As this source of revenue, even if treated in a non-discriminatory manner, is withdrawn from local reach by inference from the delegated grant, the exemption of those engaged in interstate commerce from the taxation others bear should not be extended beyond the necessity of keeping that commerce free from interference. Consequently, property taxes on the instrumentalities or net income taxes on the proceeds of interstate commerce are upheld.

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* Tax on telegraph office handling local and interstate messages. *Leloup v. Mobile*, 127 U. S. 640; Tax of $50.00 a car on all sleeping cars used in state in both inter- and intrastate business. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; Tax of $5 per wagon and 50 cents per driver, on express wagons used indiscriminately in inter- and intrastate business, *Adams Express Co. v. N. Y.*, 232 U. S. 14; Tax of $50 for each gasoline distributing station engaged in making both local and interstate sales, *Bowman v. Continental Oil Co.*, 256 U. S. 642; Tonnage tax on interstate freight destined to or originating in state, *State Freight Tax Case*, 15 Wall. 232; Tax on railroad interstate revenues earned within state, *Galveston, etc., Ry. Co. v. Texas*, 210 U. S. 217; Tax on state's allocated proportion of interstate revenues from telephone service. *New Jersey Bel. Tel. Co. v. State Board*, 280 U. S. 338; Tax on telephone company of so much for each telephone instrument, whether used in interstate or intrastate business, or both, *Cooney v. Mountain States Tel. Co.*, 294 U. S. 384; Tax on gasoline used by interstate ferry doing no local business, and already in ferry's tanks when entering taxing state. *Helson v. Kentucky*, 279 U. S. 245; Tax on gasoline used by interstate stage and already in carrier's tanks when entering state. *Bingaman v. Golden Eagle Stages*, 297 U. S. 626.

Cudahy Packing Co. v. Minnesota, 246 U. S. 450; *United States Glue Co. v. Oak Creek*, 247 U. S. 321." *Coverdale v. Pipe Line Co.*, 303 U. S. 604, 610.

It is our position that as applied to the Utilities, the California "use" tax is no more a direct tax on interstate commerce than is an ordinary *ad valorem* tax imposed by the states through which such Utilities operate.

Same—California "use" tax and retail sales tax statutes should be construed together to discover whether either or both constitute a direct tax on appellants' interstate activities.

Chapter 1020, Laws of California of 1933, provided:

"Sec. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of two and one-half per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of two per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes.

* * * * * * * * * *

"Sec. 8½. The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. * * *."

By chapter 355, Laws of California of 1935, section 3 was amended to read as follows:

"Sec. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers * * * at the rate of three per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. * * *."

Section 3 of the California "Use Tax Act of 1935" (ch. 361, Laws of Calif. of 1935) provides:

"Sec. 3. An excise tax is hereby imposed on the storage, use, or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property. * * *"

By section 4 there was exempted from the operation of such "use" tax, gas, electricity, water, gold bullion, gold concentrates, gold precipitates, property used for the performance of public works contracts executed prior to August 1, 1933, motor vehicle fuel otherwise taxed, and food products purchased for human consumption.

By chapter 401, Laws of California of 1937, locally built ships in excess of 1,000 tons burden, were also exempted.

The retail sales tax act of 1933, as amended, contains the same exemptions as the 1935 "use" tax act. (Sec. 5, ch. 1020, Laws of Calif. of 1933, as amended by ch. 355, Laws of Calif. of 1935; ch. 400, Laws of Calif. of 1937.)

From this it seems plain that the California retail sales tax act of 1933 as amended, and the California 1935 "use" tax act are in *pari materia*, and were intended as complimentary measures enacted with the purpose of collecting a portion of the expense of government from the state's inhabitants measured by the individual's ability to acquire and enjoy the use of tangible personal property. Without the "use" tax, the burden would have fallen unequally since those making purchases in other states or in interstate commerce would have escaped the tax. The "use" tax was obviously intended to make the burden equal and uniform.

We submit, therefore, that the two acts must be construed together to discover whether either or both amount to an unlawful burden on interstate commerce. *Gregg Dyeing Co. v. Query*, 166 S. C. 117, 164 S. E. 588, 286 U. S. 472, 479-480; *Baker v. Druesedow*, 263 U. S. 137, 142, and cases cited; *Hinson v. Lott*, 75 U. S. 148, 152-3; *Henneford v. Silas Mason Co.*, 300 U. S. 577, 584.

In the case last cited the Court construed together the Washington "use" tax and retail sales tax measures concluding therefrom that the exaction of the "use" tax after the property had come to rest was not so measured or conditioned as to hamper or discriminate against transactions of interstate commerce.

Same—Court not bound by name given tax.

Where a Federal question is involved, the courts are not bound by the label attached to a tax by the Legislature, the courts, or local administrative officers, but will determine for themselves the true nature of the tax by ascertaining its operation and effect. *Western Union Tel. Co. v. Kansas*, 216 U. S. 1; *Mugler v. Kansas*, 123 U. S. 623, 661; *Galveston, etc., Ry. Co. v. Texas*, 210 U. S. 217, 227; *Educational Films Corp. v. Ward*, 282 U. S. 379, 387; *Lawrence v. State Tax Commission*, 286 U. S. 276, 279-280.

For instance,—it would be unimportant that state courts may have held either the same or similar sales or "use" taxes not to be a property tax within the contemplation of the local constitution requiring uniformity of property taxation,—and for this reason:

The federal courts' conclusion as to whether a given state tax offends the commerce clause must, of necessity, be of uniform application in each of the several states.

Let us suppose these identical tax measures appeared on the statute books of each of two states. Would this Court adjudge invalid as violative of the commerce clause the statutes of one state because its courts had declared such taxes to be excises, and sustain the identical statutes of the other because called by the courts of that state, a property tax? Obviously not. The effect of a state tax on interstate commerce cannot, we submit, be influenced by the particular label placed upon such tax by the local courts. The same law must be as inoffensive or obnoxious to the commerce clause in Colorado as in Indiana.

See in this connection, *Eastern Air Transport Inc. v. South Carolina Tax Commission*, 52 Fed. (2d) 457, 285 U. S. 147, 152.

Same—Construed together, the California retail sales tax and "use" tax are no more burdensome to interstate commerce than is the ordinary property tax.

A property tax is ordinarily fixed at a certain rate on the market value of property. The California sales and "use" taxes are measured by a constant rate—three per cent—applied to the *best evidence of the property's value*, namely, its purchase price new. Both are paid by the one acquiring title—the sales tax by the purchaser, and the "use" tax by the one purchasing and using the property within the state. Both are uniform as to application, since with unimportant exceptions, they apply uniformly to all articles purchased after July 1, 1935.

The sales or "use" tax being collected but once, represents the particular property's only contribution to the expense of government up to the time of its first regular assessment for ad valorem tax purposes. Then, if the per-

sonalty purchased locally or purchased elsewhere and used locally is still in California on the assessment date, it is subject either to a personal property tax, or, if incorporated into fixtures, to a real property tax.

Thus, in practical effect, all chattels used in California and purchased after July 1, 1935, are subject to a 3% sales or "use" tax imposed but once, and measured by 3% of their value, and thereafter are subject to the ordinary, periodically-imposed *ad valorem* property tax.

Let us assume that, instead of the offending tax, and in addition to its other property taxes assessed annually, California had undertaken to levy an *ad valorem* tax at a uniform rate upon all chattels acquired after a certain date, and having their actual situs within the state. Such a tax, being both in name and effect, a true property tax, could not, even as to chattels used by interstate utilities, be held violative of the commerce clause. Yet in what way would it be less burdensome to interstate commerce, than the state "use" and sales taxes now before us? Obviously the tax burden is precisely the same, whether the exaction be conditioned on the purchase or use of property or be conditioned on its mere ownership.

"In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an *ad valorem* property tax upon tangible property used exclusively in such business." *Pac. Tel & Tel. Co. v. Tax Commission*, 297 U. S. 403, 413.

"Calling the tax an excise when it is laid solely upon the use (*Vancouver Oil Co. v. Henneford*, 183 Wash. 317; 49 P. (2d) 14) does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership. 'A nondiscriminatory tax upon local sales * * * has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect

upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.' *Eastern Air Transport Inc. v. South Carolina Tax Comm'n*, 285 U. S. 147, 153." *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582-3.

And see *Brown v. Maryland*, 12 Wheat. 419, and *Cook v. Pennsylvania*, 97 U. S. 566, holding that in its effect on foreign commerce, a tax on the sale of an imported article is equivalent to a tax on the goods sold.

California "use" tax is nondiscriminatory and cannot result in multiple taxation, and hence, as applied to chattels used as part of the plants of interstate utilities, does not unlawfully burden interstate commerce.

Nondiscriminatory state taxes not imposed directly on interstate commerce, but affecting it only incidentally and remotely, are held not to violate the commerce clause. *Hump Hairpin Mfg. Co. v. Emmerson*, 258 U. S. 290, 294; *Western Cartridge Co. v. Emmerson*, 281 U. S. 511, 514; *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249, 267-8; *Southern Gas Corp. v. Alabama*, 301 U. S. 148, 157.

A seemingly controlling test for determining when a nondiscriminatory state tax constitutes a forbidden direct burden on interstate commerce, and when a permissive indirect or incidental burden, is the possibility of multiple taxation. If the tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on interstate commerce, it is valid, and *vice versa*. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 260; *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, 612-3; *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 311-312.

Using this test, it is apparent that the California "use" tax act as applied to chattels incorporated and used

in a utility's interstate plant, does not unlawfully burden interstate commerce. No other state in which the utility operates can exact of such utility a tax for the privilege of using fixed property in California. They could, of course, impose use taxes, but only with respect to the use of property within the taxing State.

It is urged by the Southern Pacific Company that "the Use Tax Act is discriminatory in the respect that it fails to provide any exemption for sales or other excise taxes which may be imposed upon the same property by other states before its sale in interstate commerce to purchasers in California." (Appellant's Brief, in Appeal 212, p. 44.)

The answer is that other states would be powerless to impose a valid sales tax on purchases made in other states, since plainly the normal transaction by which an article purchased in one state for use in another would be an interstate sale as to which no tax could be lawfully exacted either by the state where purchased or by the state to which transported.

Where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation, and the transaction is interstate and within the protection of the commerce clause. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290; *Lemke v. Farmers Grain Co.*, 258 U. S. 50; *A. G. Spaulding & Bros. v. Edwards*, 262 U. S. 66, 69, 70; *Flanagan v. Federal Coal Co.*, 267 U. S. 222; *Furst v. Brewster*, 282 U. S. 493, 497.

And compare *Adams Mfg. Co. v. Storen*, 304 U. S. 307.

It is equally obvious that neither the state of origin

nor any other state through which the chattel is transported could validly tax its use while an article of interstate commerce.

Should so unusual a situation ever arise as where a taxable use were made of an article prior to its arrival in California, appellants would be free to seek relief from the tax involving the particular article by making a claim for exemption as provided by the "use" tax act. It seems a sufficient answer to appellant's contention that the present suits are not based on the refusal of state administrative officers to grant such exemptions.

Same—Pertinent authorities.

Appellants principally rely on *Cooney v. Mountain States Tel. Co.*, 294 U. S. 384, *Helson v. Kentucky*, 279 U. S. 245, and *Bingaman v. Golden Eagle Stages*, 297 U. S. 626.

But the taxes involved in those cases were condemned as amounting in effect to direct taxation of the business of engaging in interstate commerce—in the *Cooney* case, a tax on telephone instruments used in interstate communications, and in the *Helson* and *Bingaman* cases, a tax on gasoline already in the carrier's tanks when entering the state, and used exclusively (in the *Helson* case) in propelling an interstate ferry, and (in the *Bingaman* case) in propelling an interstate motor bus.

Of course, the singling out for taxation purposes of instrumentalities so directly connected with the transmission of interstate messages as telephone sets, might well be held to constitute the direct taxation of such interstate messages themselves.

The same is true of a tax on gasoline consumed directly in the propulsion of an interstate ferry or stage. Gallonage taxes on gasoline used in highway motor vehicles has been said to amount to the same thing as a toll for the use of the highways. (*In re Opinion of the Justices*, 81 N. H. 552, 120 Atl. 629, 631; *Tirrell v. Johnston*, 86 N. H. 530, 171 Atl. 641, 645, affirmed: 293 U. S. 533.) And see *Bingaman v. Golden Eagle Stages*, 297 U. S. 626.

If such a tax amounts to a toll for the use of highways, it would likewise, if applied to gasoline used on interstate ferries, amount to a toll for the use of the navigable water connecting the two states.

The present case we believe to be controlled, rather, by *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, where a state excise imposed on the production of mechanical power used to propel by compression natural gas through an interstate pipeline was held not to be void as a direct tax or unlawful burden on interstate commerce or transportation. The *Helson* and *Cooney* cases were there distinguished as belonging "to the category of cases which construe the State tax acts involved as taxes on interstate commerce and its instrumentalities rather than on operations closely connected with but distinct from that commerce." (303 U. S. 611.)

Far more removed from direct taxation of interstate commerce, we submit, is a "use" tax of general application and measured by a uniform rate applied to purchase price new, obviously the equivalent of value.

A nondiscriminatory sales tax applied to gasoline purchased by an interstate carrier for use in interstate transportation has been sustained as not constituting a

direct burden on interstate commerce any more than a direct property tax.

Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S. 147.

Quite obviously, a state tax imposed on sales of goods intended for use, and actually used, in interstate transportation, is no less burdensome to interstate commerce than is a "use" tax measured by the purchase price of articles used locally in such interstate transportation.

And see, also, *The Delaware Railroad Tax,* 18 Wall. 206, 232, sustaining a state tax imposed on an interstate railroad company in addition to all other taxes, and measured by a percentage of the actual cash value of the allocated proportion of every share of its capital stock. Said the Court (p. 232):

"The tax imposed by the act in question affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality."

Same—Answers to various contentions made by appellants.

Objection that when tax accrues, property involved has been dedicated to public use as part of appellants' interstate plants.

We have shown that the exaction of the "use" tax on appellants' purchases has no greater or different effect upon interstate commerce than a general property tax to which the property involved may be lawfully subjected. Hence, whether accruing on mere storage or upon the physical incorporation of the chattels in appel-

lants' plants the tax is a valid exercise of the state's taxing power.

Objection of Southern Pacific Company that chattels purchased for use by utility may not have an earnings value equal to purchase price.

When its plant is assessed for *ad valorem* taxation, the utility may perhaps be heard to argue that the earnings value of its plant does not equal its replacement cost. But when purchasing and using materials necessary to the maintenance or extension of its plant, it surely cannot be held to stand on any other or different plane than any other taxpayer. Plainly it would not be relieved of any portion of a sales tax for the reason urged. Why should a different rule apply to a "use" tax?

Contention of Telephone Company that "Use" tax act was not intended to apply to articles not sold or manufactured in California.

In other words, counsel asks the Court to read into the California statute an exemption not there. Aside from appellants' failure to raise the question in its complaint and thus afford appellees an opportunity to present evidence bearing on legislative intent, the following, among many reasons, suggest themselves as completely refuting this contention:

(a) The California Use Tax Act of 1935 contains no clause either expressly or impliedly exempting from its operation the use of chattels not locally sold or produced;

(b) In plain language said Act taxes the local use of all chattels, irrespective of whether locally sold or

manufactured. Resort to interpretation for purpose of injecting judicial exemptions is not permissible;

(c) The enumeration of exceptions to a general statutory provision by necessary implication excludes all other exceptions. The California Act taxes the local use of all chattels purchased, and in section 4 enumerates certain specific exemptions. Since these exemptions fail to include chattels not locally sold or produced, it follows that no such exemption was intended;

(d) The true legislative intent was to tax the local use of the subject matter of all sales not directly taxable by reason of the Commerce Clause;

(e) The legislature intended a practicable tax measure. The construction contended for would make it wholly unworkable;

(f) The legislature intended a constitutional revenue measure. The construction contended for would make it violative of the equal protections clause. For taxation purposes, there could be no reasonable basis for placing the users of competitive articles in one class and those using non-competitive articles in another.

In *Pacific Tel. & Tel. Co. v. Henneford*, 95 Wash. Dec. 465, 81 Pac. (2d) 786, cited by counsel, the Washington supreme court seemingly based its decision solely on the legislative designation of the tax as a "compensating" tax, which is not true of the California measure. In any event, the Washington decision offends so many well-established rules of statutory construction as not to justify serious consideration as a precedent.

Contention that "use" tax act is extraterritorial in its operation and therefore violative of the due process

clause because the Southern Pacific Company stores materials and supplies in California for use in whole or in part elsewhere.

This, of course, would in no event constitute a valid objection to the tax in so far as its exaction is based on the actual incorporation of such materials in appellant's fixed plant in California.

In so far as taxable use includes storage, the objection would not apply to goods stored as part of interstate transportation, for such storage would be exempt from any kind of state taxation.

As to such articles, if any, as to which appellant's objection may be well taken, appellant may claim exemption and if the same is denied, may secure effective relief either at law or in equity.

Contention that "use" tax is imposable only if sole use is within the state, and that interstate telephone property, though physically present in California, is used in part elsewhere.

Section 3 of the California "use" tax act provides:

"An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer." etc. (Sec. 3, ch. 361, Laws of Calif. of 1935.)

It is to be noted that the tax is on the "use *or other consumption*" in California, thus clearly indicating that it was the actual, *physical* use involving actual consumption in California that was intended to be taxed—not such use of local switchboards, etc., as might be involved in interstate telephonic communication.

In sustaining the Washington "use" tax, the Court said in *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582:

"The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. * * * A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively."

Just as it is the local use *in California* that constitutes one of the bundle of privileges making up that portion of the Telephone Company's property taxable *ad valorem* in California, so it is the local use of such property upon which that state may impose, and has imposed, a "use" tax. It has sought to tax the use of only local property, and as to this, to tax only that use which is within its jurisdiction, namely the physical use made of such property in California.

For the reasons urged, we respectfully submit that the decrees of the statutory three-judge district court should be sustained.

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Amici Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 212.—October Term, 1938.

Southern Pacific Company, Appellant,
vs.
Andrew J. Gallagher, Fred E. Stewart, Richard E. Collins, William G. Bonelli and Harry B. Riley, as Members of the State Board of Equalization of the State of California, et al.

Appeal from the District Court of the United States for the Northern District of California.

[January 30, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

The California Use Tax Act of 1935[1] is assailed as violative of the commerce clause and the Fourteenth Amendment, when imposed upon tangible personal property, bought outside of the state by the Southern Pacific Company, an interstate railroad, and installed on importation, or kept available for use, as a part of its transportation facilities.

The attack comes by means of a bill of the Southern Pacific Company seeking, before a three-judge district court,[2] an interlocutory and final injunction against the State Board of Equalization of California, its members and the Attorney General of the state, to restrain them from enforcing the Use Tax Act.[3] The trial court granted an interlocutory injunction and denied a motion to dismiss[4] but later refused a permanent injunction and sustained the motion to dismiss.[5] The case comes here by appeal.[6]

The Use Tax Act is complemental to the California Retail Sales Tax Act of 1933.[7] The latter levies a tax upon the gross receipts

[1] Cal Stats. 1935, ch. 361.
[2] Sec. 266, Jud. Code, 28 U. S. C. A. § 380.
[3] As the bill was filed July 10, 1936, there was jurisdiction. 50 Stat. 738.
[4] Southern Pac. Co. v. Corbett, 20 Fed. Supp. 940.
[5] *Id.*, 23 Fed. Supp. 193.
[6] Sec. 266, Jud. Code, 28 U. S. C. A. § 380.
[7] Cal. Stats. 1933, ch. 1020, as amended, Cal. Stats. 1935, chs. 351, 355, 357.

of California retailers from sales of tangible personal property; the former[8] imposes an excise on the consumer at the same rate for the storage, use or other consumption in the state of such property when purchased from any retailer. As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government. Definitions in the Use Tax Act of taxpayer, retailer, storage and use are designed to make the coverage complete. A retailer is "every person, engaged in the business of making sales for storage, use or other consumption"; use is the exercise of any right or power incident to ownership, except sale in the regular course of business; storage is any "keeping or retention" with a similar exemption; and a taxpayer includes everyone "storing, using or otherwise consuming" the property subject to the use tax.[9]

The principle of the use tax as applied to property brought into the state after its retail purchase for intrastate use has been upheld in *Henneford* v. *Silas Mason Co.*,[10] against the charge that it was a tax upon the operations of interstate commerce or a tax upon a foreign sale, violative of the Fourteenth Amendment. Under the Washington statute, there considered, discrimination against interstate commerce, arising from a second exaction for use after a foreign tax on sale, could not exist as provision was made for a credit against the local tax of any such foreign levy. No such problem arises here by evidence, finding or assignment of error,[11] even though the California Act does not have this provision. It will be time enough to resolve that argument "when a taxpayer paying in the state of origin is compelled to pay again in the state of destination."[12] A discrimination against goods of out-of-state origin on the face of the sales and use acts is suggested because the local retailer may absorb the sales tax while the consumer of an imported article must pay the use tax.[13] But this is not a discrimination in the law. California's exaction for the distribution of tangible personal property is the same, whether purchased within or without her borders or whether paid by the retailer or

[8] California Use Tax Act, *supra*, Section 3.

[9] *Id.*, Sections 2, 3.

[10] 300 U. S. 577. Cf. Felt & Tarrant Mfg. Co. v. Gallagher, No. 302, October Term 1938, decided this day.

[11] New York v. Kleinert, 268 U. S. 646, 651.

[12] Henneford v. Silas Mason Co., 300 U. S. 577, 587.

[13] National Ice & Cold Storage Co. v. Pacific Fruit Express Co., 93 Cal. Dec. 442, 445-8.

consumer. There is an equal charge against what is used, whatever its source. In this case we have a distinctly different application of a use tax. The tax is not sought from personal property used in transactions entirely disassociated from any agency connected with interstate transportation, as builders' supplies for local work in the *Silas Mason* case, but from tangible personalty purchased out of the state for immediate or subsequent installation in an interstate railway facility.

The appellant, the Southern Pacific Company, a Kentucky corporation, handles intrastate, interstate and foreign commerce over its railroad system which traverses a number of states and connects with the lines of carriers covering the continent. The findings and stipulation of facts show continual extrastate purchases of tangible personalty for the operation of the road; rails, equipment, machinery, tools and office supplies. Some of the purchases are used in the general offices of the corporation, located in California, for the supervision of the wide-flung activities; others are for material kept in readiness as a stand-by supply to replace or repair equipment damaged, destroyed or worn out in the operation of the road; and still others are to make improvements, replacements or extensions pursuant to previously determined plans and specifications. Few, if any, of the supplies are stored for long term needs. Storage is merely incidental to protection until use, as office supplies in a closet or an extra frog at a section tool house. For construction or reconstruction upon a large scale, special orders are given and arrangements made, so that the material is fabricated for a particular use in the transportation facilities, shipped to its California destination and installed upon arrival. To avoid delay and cost the movement from loading to final placement is as nearly continuous as managerial efficiency can contrive. While some articles are capable of general use, the major purchases of rails, repair parts and supplies for the maintenance and operation of the system are adapted only to railroad use. The purchases are paid for out of railroad operating capital and move on company material waybills, without transportation charge. All purchases may be said to be dedicated to consumption in the interstate transportation business of appellant. No new rolling stock is involved. Subsequent to repairing and reconditioning, rolling stock moves again in interstate transportation, as do cars after being stocked with

supplies. The California tax on storage or use, it is said, cannot apply to these articles, as such a tax would be an unconstitutional burden upon the facilities of interstate commerce, of which the articles are a part.

There is agreement upon the principle involved. Appellant states that an excise tax imposed directly upon the privilege of using instrumentalities in carrying on interstate transportation is a direct and unconstitutional burden on commerce. Appellees do not dispute the premise but contend that the tax is on intrastate storage and use. They point to the definition of use as the exercise of a right of ownership, and of storage as any keeping or retention. By the definitive terms themselves, it is urged, the taxable events are retention and installation, not such storage as warehousing connotes, or use in the sense of consumption or operation. If we conclude retention and installation, under the circumstances here developed, are intrastate taxable events, viewed apart from commerce, we must still inquire whether taxes laid upon them are not in effect, upon commerce, and forbidden.[14]

Two lines of authority aid in considering the effect of this tax on commerce. The first makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid. States cannot tax interstate telegraph messages[15] or freight shipments.[16] A license tax on sales by samples burdens one selling only goods from other states.[17] A tax act as applied to the business of interstate communication[18] is unconstitutional. Where a similar levy by other states may be imposed, with consequent multiplicity of exaction on commerce for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions, is considered identical with an exaction on the commerce itself.[19] This rule is applicable to a tax on gross receipts from interstate transportation;[20] an occupation tax measured by gross receipts from radio broadcasting,[21] and a general tax

14 Cf. Ozark Pipe Line v. Monier, 266 U. S. 555.

15 Telegraph Company v. Texas, 105 U. S. 460.

16 Case of the State Freight Tax, 15 Wall. 232.

17 Robbins v. Shelby County Taxing District, 120 U. S. 489, 496, 497; Brennan v. Titusville, 153 U. S. 289.

18 Leloup v. Port of Mobile, 127 U. S. 640.

19 See the discussion in Gwin, White & Prince, Inc. v. Henneford, No. 7, October Term 1938, decided January 3, 1939.

20 Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326, 336.

21 Fisher's Blend Station v. Tax Comm'n, 297 U. S. 650.

at specified rates upon the gross income of every resident, construed as "a tax upon gross receipts from commerce"[22] "without apportionment."[23] The measurement of a tax by gross receipts where it cannot result in a multiplication of the levies it upheld.[24]

Appellant selects from this line the *Helson* case[25] as determinative of the contention that a tax on use of supplies or equipment is a tax on the commerce. A state tax of three cents per gallon was imposed on all gasoline "sold at wholesale." This phrase was defined to include gasoline bought out of the state and used within the state. There was no definition of the word use or used. The taxpayers operated an interstate ferry, purchased gasoline in Ohio and used that portion sought to be taxed in propelling their craft in the territorial waters of Kentucky. The court considered the tax on the consumption of the gas the same as a tax on the operation of the ferry boat and therefore invalid under the rule discussed in the preceding paragraph.

The second line of authority supports the view that use and storage as defined in the California act are taxable intrastate events, separate and apart from interstate commerce. A recent discussion of the topic sets out the precedents in support of a ruling that a tax upon the production of power by the use of which compressors drove natural gas in interstate commerce is valid. Such production is a taxable event distinct from its consumption in commerce.[26] Particular attention is called by the state to the *Wallace* case.[27] There the tax was on "selling or storing or distributing gasoline." It became due on withdrawal from storage. The tax was held applicable to gasoline, purchased out of the state and stored in the state, "when all is withdrawn and used . . . as a source of motive power in interstate railway operation" and valid against the objection that "it is in effect a tax upon the use" in interstate

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[22] Adams Mfg. Co. v. Storen, 304 U. S. 307, 311.

[23] For comparison with sovereign immunity rule and reason for variation, see James v. Dravo Contracting Co., 302 U. S. 134, 157, 158.

[24] Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 256, and cases cited. Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604, 612; Aitken v. Shelby County Taxing District, 145 U. S. 1; and American Mfg. Co. v. St. Louis, 250 U. S. 459, as explained in Gwin, White & Prince, Inc. v. Henneford, *supra*, and Adams Mfg. Co. v. Storen, *supra*, 312.

[25] Helson and Randolph v. Kentucky, 279 U. S. 245; see also Bingaman v. Golden Eagle Lines, 297 U. S. 626.

[26] Coverdale v. Pipe Line Co., 303 U. S. 604, 609.

[27] Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249.

commerce.[28] The invalidity of such a tax arises from a levy on commerce itself or its gross receipts, not upon events prior to the commerce.[29]

The principle illustrated by the *Helson* case forbids a tax upon commerce or consumption in commerce. The *Wallace* case, and precedents analagous to it, permit state taxation of events preliminary to interstate commerce. The validity of any application of a taxing act depends upon a classification of the facts in the light of these theories. In the present case some of the articles were ordered out of the state under specification suitable only for utilization in the transportation facilities and installed immediately on arrival at the California destination. If articles so handled are deemed to have reached the end of their interstate transit upon "use or storage," no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison farther removed from interstate commerce. We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use — retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun. *Champlain Co.* v. *Brattleboro*[30] and *Carson Petroleum Co.* v. *Vial*[31] are therefore inapplicable. *Bacon* v. *Illinois*,[32] where taxation of grain during stoppage in transit was validated, presents a closer analogy. "Practical continuity" does not always make an act a part of interstate commerce.[33] This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation.

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28 *Id.*, 265-66; see Edelman v. Boeing Air Transport, 289 U. S. 249, 252; Gregg Dyeing Co. v. Query, 286 U. S. 472, 479.

29 *Id.*, 267.

30 260 U. S. 366.

31 279 U. S. 95.

32 227 U. S. 504.

33 Oliver Mining Co. v. Lord, 262 U. S. 172; Hope Natural Gas Co. v. Hall, 274 U. S. 284; Utah Power & L. Co. v. Pfost, 286 U. S. 165.

This is not significant.[34] The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress.

But it is urged by the appellant that our former opinions make this conclusion a departure from precedent; the events are so close to or so inseparably intertwined with interstate commerce, as to be a part of it.[35] *Cooney* v. *Mountain States Telephone Co.*[36] is cited to show that a "state excise tax cannot be validly applied indiscriminately and without apportionment to an instrumentality common to interstate and intrastate commerce." The Telephone Company was taxed a sum on each telephone in use. As the instrument was employed part of the time in interstate commerce, this Court held the tax to be upon that commerce and invalid. Since there was no apportionment the entire tax fell. Unless the taxable events here, all of which are intrastate, are in effect a part of interstate commerce, our previous discussion of their separable character would render the *Cooney* case inapplicable. For this point we are referred to *Puget Sound Co.* v. *Tax Commission*[37] and *Ozark Pipe Line* v. *Monier.*[38]

In the former case, the distinction in the opinion between stevedoring in loading and unloading interstate cargoes, held non-taxable as a burden upon commerce, and the business of supplying longshoremen for others to load and unload, held taxable as a local business, is applicable here. The invalid tax in the *Puget Sound* case was on the business of stevedoring, measured by a percentage of gross receipts from interstate activity. The valid tax was a similar percentage on the local activity as an employment agency. Here, under our analysis, we find only intrastate events taxed.[39]

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[34] Western Live Stock v. Bureau, 303 U. S. 250, 254, and cases cited.

[35] Cf. Henneford v. Silas Mason Co., 300 U. S. 577, 583.

[36] 294 U. S. 384.

[37] 302 U. S. 90.

[38] 266 U. S. 555.

[39] Under the commerce clause the regulatory power of the Congress is customarily exercised on transactions taking place within the state on the principle

In the *Ozark* case, Missouri sought to justify a franchise tax on a company engaged in the operation of an interstate pipe line by suggesting the tax was upon certain intrastate events, such as operation of communications, repair and purchase of supplies. The tax was forbidden because on the privilege of doing an exclusively interstate business. The opinion is to be read in the light of the statement by the Court of its interpretation of the facts and legal deductions which control its decision. The Missouri Act called for a franchise tax of a percentage of the par of its stock, apportioned to its assets in that state. This Court said that "the tax is one upon the privilege or right to do business," and as the taxpayer "is engaged only in interstate commerce" the tax "constitutionally cannot be imposed." There was then added this paragraph:

"The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the State, were all exclusively in furtherance of its interstate business; and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected."[40]

This Court pointed out that the corporation had a license to engage exclusively in interstate business.[41] The language just quoted shows that this Court interpreted the transactions in Missouri as merely a part of the interstate commerce and the tax on the franchise an interference therewith because a tax directly upon it.[42] " . . . nothing was done in Missouri except in furtherance of transportation."[43] It was this conclusion of the Court on the factual situation which brought about the *Ozark* decision. Where there is also intrastate activity, an apportioned state franchise tax on for-

that such acts are an essential part of interstate commerce. See Currin v. Wallace, No. 275, October Term 1938, decided this day, and cases cited. Cf. Townsend v. Yeomans, 301 U. S. 441.

[40] 266 U. S. 555, 565.

[41] *Id.*, 567.

[42] Anglo-Chilean Corp. v. Alabama, 288 U. S. 218, 224; *id.*, minority, 236; Virginia v. Imperial Coal Co., 293 U. S. 15, 20.

[43] Southern Gas Corp. v. Alabama, 301 U. S. 148, 155.

eign corporations doing an interstate business is upheld.[44] A franchise tax on an exclusively interstate business is a direct burden; proportioned to an intermingled business, it is valid.[45] Since the incidence of the California tax as here interpreted is upon events outside of interstate commerce, the *Ozark* opinion is not applicable. There the Missouri tax was upon activities found wholly interstate.

Finally, appellants urge that the tax violates the due process clause of the Fourteenth Amendment because exacted for consumption of office and car supplies outside the state, upon their appropriation in California by the general office to the use of the whole system.[46] This contention falls with the determination that the taxable event is the exercise of the property right in California. This Court declined to accept a similar argument in the *Silas Mason Company* case.[47]

Affirmed.

Mr. Justice BLACK concurs in the result.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[44] *Id.*, 156.

[45] See also Atlantic Lumber Co. v. Comm'r, 298 U. S. 553, 556.

[46] James v. Dravo Contracting Company, 302 U. S. 134; Connecticut Gen'l Life Ins. Co. v. Johnson, 303 U. S. 77; Frick v. Pennsylvania, 268 U. S. 473; Great Atlantic & Pacific Tea Company v. Grosjean, 301 U. S. 412; International Paper Co. v. Massachusetts, 246 U. S. 135.

[47] Henneford v. Silas Mason Co., 300 U. S. 577, 578.

SUPREME COURT OF THE UNITED STATES.

No. 212.—October Term, 1938.

Southern Pacific Company, Appellant,
vs.
Andrew Gallagher, Fred E. Stewart, Richard E. Collins, William G. Bonelli and Harry B. Riley, as members of the State Board of Equalization of the State of California, et al.

Appeal from the District Court of the United States for the Northern District of California.

[January 30, 1939.]

Mr. Justice Butler.

Mr. Justice McReynolds and I are of opinion that the judgment should be reversed.

The facts stated in the opinion just announced leave nothing of substance to support its conclusion that the California tax is not upon the operation—maintenance and use—of appellant's railroad for interstate transportation. Discussion can neither obscure nor more plainly disclose the truth that the tax in question directly burdens commerce among the States. Concededly, that is repugnant to the commerce clause as, from the beginning, it has been construed by this Court.